(18,200.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 347.

ALPHONSE EMSHEIMER, APPELLANT,

vs.

THE CITY OF NEW ORLEANS.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1901.

1 UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1900, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

ALPHONSE EMSHEIMER
v.
CITY OF NEW ORLEANS.

Be it remembered that heretofore, to wit, on the 14th day of July, 1900, a transcript of the record of the above-styled cause from the circuit court of the United States for the eastern district of Louisiana, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, and said cause coming on to be heard at the present November term, 1900, was argued by counsel, whereupon it was ordered that the following questions and propositions of law arising on the record, be certified to the Supreme Court of the United States, to wit:

2 U. S. Circuit Court of Appeals. Filed May 28, 1901. J. M. McKee, Clerk.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

ALPHONSE EMSHEIMER, Appellant,
v.
THE CITY OF NEW ORLEANS, Appellee. } No. 971.

Appeal from the United States circuit court, eastern district of Louisiana.

This suit was commenced by filing in the circuit court the following:

"*Bill and Exhibit.*

Filed November 13th, 1899.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, New Orleans division:

Alphonse Emsheimer of New Orleans, an alien and a subject of the Empire of Germany, brings this his bill against The City of New Orleans, a municipal corporation created by the laws of Louisiana, and a citizen of said State. And thereupon your orator complains and says:

1st. That by an act of the legislature of Louisiana (No. 74), approved September 14th, 1868, the parishes of Orleans, Jefferson and St. Bernard were territorially united in one district for the purpose of police government therein, called the 'Metropolitan police district of New Orleans, State of Louisiana;' that the government of said district for police purposes was vested in a board of commissioners, styled 'the board of Metropolitan police.'

2nd. That said board was required to appoint all the officers and employés of the police force required in said district, and their salaries (which *was* prescribed by the act) were required to be paid monthly; that by said act and acts of said legislature, supplementary to and amendatory thereof, said board was required to make annually an estimate of the expenses of maintaining a
3 police force in said district, and to apportion the same to the several cities and parishes within said district, and said cities and parishes were required by said acts to promptly pay, and to provide the means for promptly paying, the amounts thus apportioned to them.

3rd. That said city of New Orleans was a municipal corporation created by the laws of said State of Louisiana, and was within said Metropolitan police district; that said board from and after its creation, as aforesaid, annually made the estimate of expenses of maintaining said Metropolitan police and apportioned the same to said several cities and parishes as required by said acts.

4th. That the apportionments made by said board aforesaid to the city of New Orleans for all the years from 1869 to 1876, inclusively, amounted to the sum of $6,033,030.51, and when said apportionments were made and notified, as they were to said city, she became liable to said board of Metropolitan police for the amount thereof.

5th. That like apportionments of police expenses were made by said board to the cities of Jefferson and Carrollton, which were within said police district, for which apportionments they each became liable to said board, but afterwards by acts of said legislature, said cities were consolidated with said city of New Orleans, which by said acts of consolidation was made liable for their debts, including those created for their apportionment of police expenses aforesaid.

Your orator has not sufficient information to state the amount of the liabilities thus created and imposed upon said city of New Orleans, but avers upon information and belief, that it was sufficient to pay and discharge the proportion of police expenses due by each of said cities.

6th. That like apportionments were made by said board of police expenses to be paid by said parishes of Jefferson and St. Bernard and the city of Kenner, all within said police district, and notice given to each of said corporations thereof, as required by law, and thereupon they became and were absolutely liable to said board for the amount of their respective apportionments; but what the amounts of said apportionments were complainant is unable to state,

but avers that they were sufficient to meet the annual police expenses within their respective jurisdictions.

7th. That while said cities and parishes within the police district were required to promptly pay and to provide the means for promptly paying their respective apportionments, the councils of said cities and the police juries of said parishes were authorized to raise the amount required for that purpose by levying taxes upon the persons and things subject to taxation within their respective jurisdictions, and for that purpose did severally make such levies, and your orator avers that said city of New Orleans annually, during the whole period of the existence of said board, included in her budget of expenditures the amount thus apportioned to her, and in pursuance of said authority levied and collected taxes for the purpose of paying the same, and paid upon account thereof large sums of money, but not enough to discharge her liability in the premises, there still being due upon account thereof, including Carrollton, the sum of two hundred and forty-one thousand, one hundred and six and $\frac{54}{100}$ dollars ($241,106.54), and the defendant, the present City of New Orleans, successor of said city, as existing at the time said apportionments were made, is liable therefor.

4 8th. And your orator avers that said City of New Orleans was and is a statutory trustee of the money derived from such taxation, and collected by her for the purpose of paying said apportionments of police expenses; that ever since said several levies of such taxes said city has been, and still is making collections thereof, and has collected large sums of money on account thereof, for which she has failed to account and still holds subject to said trust, the amount thereof being to your orator unknown; that for a portion of such collections a receiver was appointed by the civil district court for the parish of Orleans with the consent of said city, to whom said city on July 25th, 1888, paid the sum of thirty thousand nine hundred and forty-four $\frac{94}{100}$ dollars ($30,944.94) part and parcel of the moneys derived from the collection of such taxes as well as other small sums thereafter, the amount and date of payment of which is to your orator unknown.

And your orator avers that afterwards, to wit, on the 27th of December, 1890, said receiver died, and that said board has been since then, and is now without any successor or representative, and its affairs are under no administration whatsoever; that said City of New Orleans has since the death of said receiver continued to collect said police taxes, and is still collecting the same, the amount of such collections being to your orator unknown, but he avers that it is a large amount, no part of which she has applied to the payment of any of her indebtedness on account of said apportionments; and that she holds the same subject to said trust as above averred.

And your orator avers that large amounts of said police taxes levied, as aforesaid, became delinquent, and thereafter interest accrued thereon at the rate of ten per cent. per annum; that said City of New Orleans collected large amounts of such interest, which as accessory to said taxes should have been paid to said police board, but which she neglected and refused in violation of her duty as

trustee, to apply to the payment of said apportionments, and she should be required to account for the same with interest thereon; that the amount of police taxes as well as the interest thereon, so as aforesaid collected, is unknown to your orator, and he is entitled to an account thereof from said city before one of the masters of this honorable court, or otherwise, as your honors may direct.

9th. That said board of Metropolitan police, in obedience to the laws creating and governing the same, organized a Metropolitan police force in said district and maintained the same until March 31st, 1877, when said act No. 74 of September 14th, 1868, establishing said Metropolitan police district, as well as all other acts amendatory thereof and upon the same subject-matter, were repealed, and said board of Metropolitan police was abolished without any provision being made for the liquidation of its affairs, or the payment of its debts.

10. That said board of Metropolitan police was a body corporate under the laws of its creation, and by the repeal of said law, ceased to be and had and has no representative or successor against whom suit might have been or may now be brought for the establishment of the demands of the complaint herein, and he is remediless, except in this honorable court, where matters of this nature are cognizable and relievable wherefore he brings this his bill in behalf of himself and all other creditors of said board, similarly situated, who may come in and contribute to the expense of this suit.

11th. That one Lew Goldstein, as holder of a large amount of Metropolitan Police warrants, issued to officers and members of the Metropolitan police, and assignee of sundry creditors of said board of Metropolitan police, on the 21st of October, 1886, brought suit in the 26th judicial district court in and for the parish of Jefferson, Louisiana, against said City of New Orleans, said City of Kenner and said parishes of Jefferson and St. Bernard, in behalf of himself and all other creditors of said board, similarly situated, praying the appointment of a receiver and enforcemeut of the liabilities of said several defendants, for the purpose of paying and discharging the obligations of said board; that citation was served on the 26th of October, 1886, upon each of said defendants to appear and answer in said suit, and afterwards said suit was removed into this honorable court, where holders of warrants and claims against said board, amounting to a much larger sum, appeared before the master appointed by the order of the court, and proved their demand, he claims now held by your orator being among those so presened and proved, as will appear by said master's report now on file, which is here referred to for greater certainty; that the case as against the City of New Orleans was afterwards dismissed upon the ground that this court had not acquired jurisdiction thereof; but as to all other defendants the same still remains pending and undisposed of.

That afterwards, to wit: February 9th, 1891, Henry W. Benjamin exhibited and filed his bill of complaint in this honorable court against said City of New Orleans and others for an account of the sums due by said defendants, applicable to the payment of the cer-

tificates and claims against said police board held by him, being the same claims upon which said Goldstein brought suit as aforesaid, and which said Benjamin has acquired; that various persons having like claims against said police board intervened in said suit and proved the same before the master therein; that among said claims sued upon by said Benjamin and said interveners, were included the obligations and claims since acquired and now held and owned by your orator, hereinafter enumerated and described; that process of subpœna in said case was duly served upon said City of New Orleans February 9th, 1891, that she afterwards appeared and answered and a final decree was made against her in favor of said complainant, and the interveners therein establishing their claims and decreeing the said city to pay the same, which suit was afterwards dismissed for want of jurisdiction in this honorable court, but without prejudice to a new bill, which decree became final January 31st, 1898.

12th. That your orator is the holder and owner of certificates issued by said board of Metropolitan police in acknowledgement of its indebtedness for services rendered to it by the persons therein named and of transfers of debts due by said police board, amounting to three thousand, thirty and forty-eight/100 dollars ($3,030.48), a list whereof is hereto annexed as Exhibit "A," and made a part of this bill; that said claims have been duly assigned and transferred to your orator for a valuable consideration, and he is now the holder and owner thereof.

And your orator avers that each of said persons in whose favor said claims accrued, and to whom said certificates were issued, or their heirs or legal representatives, are citizens respectively of States other than Louisiana and competent as such citizens to maintain suit in this honorable court against said defendant for the enforcement of said indebtedness, represented by said certificates and transfers, if no assignment or transfer thereof had been made, the citizenship of said persons being as follows viz:

6 Said D. M. Moore is a citizen of the State of New York.
" Eli Jones is a citizen of the State of Texas.
" Peter Joseph is a citizen of the State of Colorado.
" Robert Crofton is a citizen of the State of Mississippi.
" W. C. Bodechtel is a citizen of the State of California.
" J. H. Moore is a citizen of the State of Colorado.
" Edward Masterson is a citizen of the State of Ohio.
" John Dinan is a citizen of the State of Ohio.
" F. Coleman is a citizen of the State of Ohio.
" R. H. Taylor is a citizen of the State of Illinois.
" W. H. Murphy is a citizen of the State of Michigan.

Said G. H. Hamersley resided in and was a citizen of the State of California, until he died recently, leaving two sons, G. H. Hammersley and —— Hammersley, as his sole heirs, who are also citizens of the State of California.

Said Dr. J. B. Cooper resided in and was also a citizen of the State of California, where he died leaving Mrs. Catherine E. Cooper, his widow in community, as sole heir under the laws of said State of which she is a citizen.

15th. And your orator further shows and avers that there are now outstanding, due and unpaid, other warrants and certificates issued by said board of Metropolitan police, and sums due and owing by it, for services rendered and supplies furnished thereto, amounting to a large sum, the exact amount thereof being unknown to your orator, but he avers upon information and belief, that including interest thereof, the amount exceeds two hundred thousand dollars ($200,000.00); that the only assets of said board of Metropolitan police, at the time it was abolished, were the amounts due to it by the said City of New Orleans, and by other municipal corporations within said police district; that the amount due by said city as aforesaid, is applicable to the payment of the claims held and owned by your orator as aforesaid, the same being for services rendered within said city, and that he is entitled to an accounting by said city, in order that the amount due by her may be ascertained and fixed and decreed to be paid, and applied to the payment of your orator's claims, and of such others as shall join herein and contribute to the expense of this suit.

In consideration whereof and inasmuch as your orator has not a complete and adequate remedy at law to the end therefor- that the said defendant may, if she can, show why your orator should not have the relief hereby prayed, and that she may full, true and perfect answer make to all and singular the premises (but not under oath, the oath thereto being expressly waived); that an account be taken before a master to be appointed by the court, of the amount of taxes collected by the defendant on account of the assessments and levies of taxes for police purposes, as set forth in the bill, and of the amounts due by the defendant on account of the apportionments aforesaid due by her, and that the defendant may be decreed to pay into the hands of a receiver, the amount of said taxes collected, with interest thereon, since the same have come into the hands of the defendant, and a sufficient amount of the said apportionments as trust funds, to meet the demands of the complainant and other creditors similarly situated who may come into this cause and take the benefit of these proceedings, and all expenses and costs; and that the same be applied to their payment.

7 May it please your honors to grant unto your orator a writ of subpœna directed to said City of New Orleans, therein and thereby commanding her on a day to be named and under a certain penalty therein specified, to be and appear in this honorable court, then and there to answer all and singular the premises, and to stand to, abide, and perform such order and decree as to your honors shall seem meet.

And your orator prays such other and further, and general relief as the nature of the circumstances of the case may require, and as to equity and good conscience may be agreeable. And your orator will ever pray, etc.

(Signed) J. D. ROUSE,
Solicitor for Complainant.

(Signed) WM. GRANT,
Of Counsel.

EXHIBIT 'A,' Annexed to Bill of Alphonse Emsheimer.

List of Certificates of Indebtedness of Board of Metropolitan Police and Claims Against it Held and Owned by said Complainant.

Original payee.	Time.	Amount.
J. M. Moore	Nov., '74	71.23
Do.	Dec., '75	65.75
Do.	Dec., '76	35.51
Eli Jones	Nov., '74	76.72
Do.	Dec., '76	84.69
E. Jones	Dec., '74	30.13
Do.	Dec., '75	82.19
Do.	Nov., '76	59.00
Peter Joseph	Dec., '74	152.87
Do.	Dec., '75	152.87
Robert Crofton	Oct., '74	118.90
Do.	Nov., '74	115.06
Do.	Dec., '74	118.90
Do.	Dec., '75	118.90
Do.	Dec., '76	118.57
Do.	Nov., '76	82.62
W. C. Bodechtel	Nov., '74	69.31
Do.	Dec., '74	70.95
Do.	Dec., '75	69.31
J. H. Moore	Dec., '76	127.04
Edward Masterson	Nov., '74	82.19
Do.	Dec., '76	84.69
R. H. Taylor	Nov., '74	68.50
Do.	Dec., '75	71.23
John Dinan	Dec., '75	84.93
Do.	Dec., '75	84.93
G. H. Hammersley	Nov., '74	84.38
Do.	Dec., '74	90.41
W. H. Murphy	Nov., '74	51.23
Do.	Nov., '74	30.13
Do.	Dec., '74	93.42
Do.	———	66.12
F. Coleman	Nov., '74	76.71
Do.	Dec., '74	71.23
Dr. J. B. Cooper	Dec., '75	169.86
		3,030.48"

8 Thereafter counsel for The City of New Orleans entered an appearance and filed the following demurrer:

"United States Circuit Court, Eastern District of Louisiana.

ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830. In Equity.

The Demurrer of The City of New Orleans to the Bill of Complaint of Alphonse Emsheimer, the Above-named Plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, doth demur to the said bill, and for cause of demurrer showeth:

First. That enough does not appear upon the face of the bill to show the court's jurisdiction of the suit in consequence of the want of proper, sufficient and necessary averment of the citizenship of complainant's assignor or assignors of the warrants, certificates, claims or choses in action, upon which this suit is brought; nor does it sufficiently appear from the averments of complainant's said bill, who were or are the assignors of the said warrants, certificates, claims or choses in action. That by the averments of complainant's said bill, it is disclosed that this court is without jurisdiction of this suit by reason particularly of its failure to show with sufficient clearness, or to show at all, the citizenship, at the date this suit was instituted, of the parties from whom complainant acquired the said warrants, certificates, claims or choses in action.

Second. That it appears by the said complainant's said bill that the parish of Jefferson and the parish of St. Bernard are necessary parties to said bill, inasmuch as it is herein stated that by certain acts of the General Assembly of the State of Louisiana, the annual estimate of expenses for maintaining a police force in the Metropolitan police district were to be apportioned by the board of Metropolitan police to the City of New Orleans and the said two parishes, who were required by said statutes to provide the means for promptly paying the amounts thus apportioned to them; and inasmuch further, that it is therein stated that there were made by the said parishes, levies for taxes, to pay and discharge their said respective apportionments; that the said parishes and this defendant, have mutually and reciprocally a common interest herein, which the said bill affects.

Third. That said complainant has not, in and by said bill, made and stated such a cause as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Fourth. That said plaintiff has not, as appears by his said bill, made out any title to the relief thereby prayed for, that the said bill presents no matter of equity, nor do its averments, or any of them, disclose any subject within the equity jurisdiction of this court; that if, in point of law and fact, or either, complainant be entitled to any

relief against this defendant, there is a plain, adequate and complete remedy at law, by which the same may be obtained.

9 Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed, with costs and charges, in this behalf most wrongfully sustained.

(Signed) W. B. SOMMERVILLE,
(Signed) BRANCH K. MILLER,
Solicitors for Defendant."

On hearing the circuit court entered the following:

"ALPHONSE EMSHEIMER
vs.
CITY OF NEW ORLEANS. } No. 12830.

This cause came on to be heard at a former day upon the demurrer to the bill, filed by defendant, and after arguments from counsel, was submitted.

On consideration thereof for the reasons on file:

It is ordered that the defendant's first ground of demurrer be and the same is hereby overruled, the court finding and decreeing that the allegations of the citizenship of the complainant, of the original payees and of the City of New Orleans, *is* fully sufficient.

It is further ordered that defendant's third and fourth grounds of demurrer are hereby sustained, the court finding and decreeing that there is no equity in the bill of complaint herein and said bill is therefore dismissed for want of equity with full reservation of complainant's right to sue and proceed at law."

The complainant below prosecuted an appeal to this court and assigns herein errors as follows:

"1st. Said circuit court erred in sustaining the demurrer to the complainant's bill, and in dismissing the same.

2nd. Said court erred in holding that complainant's bill does not state a case within the jurisdiction of a court of equity.

Wherefore, for the errors assigned, and others manifest in the record, said complainant prays that said decree be reversed and said cause reinstated to be proceeded with according to law."

10 And now at this term, this cause came on to be heard on the transcript and was argued,—

Whereupon, for the proper decision of the case, this court, desiring the instruction of the honorable, the Supreme Court of the United States, certifies to that court the following questions and propositions of law arising on the record, to wit:

1.

This being a suit brought by an assignee to recover the contents of choses in action, does the bill state sufficient facts to give the court jurisdiction on the ground of diverse citizenship?

2.

Under the facts stated in the bill and under the proper construction of act No. 35 of the Laws of Louisiana, approved March 31, 1877, can the City of New Orleans, as a legal successor of the defunct Metropolitan police board, be held liable to the complainant as the holder of valid outstanding certificates of indebtedness issued by the late board of Metropolitan police for the amounts due on said certificates?

3.

Under the facts stated in the bill, can the complainant maintain a suit in equity in the circuit court of the United States for the eastern district of Louisiana against the City of New Orleans for the establishment of a fund out of which he in common with other creditors of the late Metropolitan police board may be paid *pro rata* upon their claims?

11 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 10 pages numbered from 1 to 10 inclusive, contain a true, full and perfect transcript of the statement, questions and propositions of law certified to the supreme court in the case of Alphonse Emsheimer appellant, *vs.* City of New Orleans appellee, as fully and completely as the same now remains of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

Given under my hand and the seal of said circuit court of appeals at the city of New Orleans on this 5th day of June, A. D. 1901.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

Endorsed on cover: File No. 18,200. U. S. C. C. of appeals, 5th circuit. Term No. 347. Alphonse Emsheimer, appellant, *vs.* The City of New Orleans. Filed June 12th, 1901.

Office Supreme Court U.S.
FILED
JAN 2 1902
JAMES H. McKENNEY,
Clerk.

No. 347.

Motion to advance.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 2, 1902.

No. 347.

ALPHONSE EMSHEIMER,
APPELLANT,

versus

THE CITY OF NEW ORLEANS,
APPELLEE.

On a Certificate from the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION TO ADVANCE THE CAUSE FOR HEARING.

This suit was brought November 15, 1899, by a creditor of the Board of Metropolitan Police of New Orleans, which corporation was abolished in 1877, without any provision being made for its liquidation or the payment of its debts. The bill is brought by the complainant in his own behalf, as well as in behalf of other creditors of said Board, to compel payment by the City of large sums due by it, and the application thereof *prorata* to the payment of the complainant and other creditors of said Board.

The bill was demurred to, for want of equity, and the jurisdiction of the Circuit Court was denied.

The demurrer to the jurisdiction was overruled, and for want of equity it was sustained, and the bill dismissed. The City of New Orleans appealed to this Court, and its appeal was dismissed. *New Orleans vs. Emsheimer,* 181 U. S. R. 153.

The complainant appealed to the United States Circuit Court of Appeals, but pending the appeal of the defendant to this Court, said Court of Appeals declined to hear the complainant's appeal. After the appeal to this Court was dismissed, the Court of Appeals heard the case, and made the certificate here now pending. Under the circumstances recited, and because of the long delay to which the complainant has been subjected, he moves that this cause be advanced upon the docket and assigned for an early hearing.

Respectfully submitted,

J. D. ROUSE,

WM. GRANT,

Solicitors.